Amended Petition
S.B.
Hon'ble J. Bhadoo (2)

CF0000154103

AMENDED PETITION AS PER HON, COURT ORDER DT 28.10.2004

IN THE HIGH COURT OF JUDICATURE AT BILASPUR [CHHATTISGARH]

WRIT PETITION NO. 3318 OF 2004

PETITIONER

Shiv Singh Chouhan s/o late Shyamji Chouhan, aged 36 years, occupation-Engineer & Contractor, r/o 27 Kholi, **Bilaspur** (CG).

VERSUS

RESPONDENTS

1. State of Chhattisgarh through Secretary, Panchayat, D.K.S. Bhawan, **Raipur** (CG).
2. Nagar Panchayat, Takhatpur, District Bilaspur through its Chief Executive Officer, Nagar Panchayat, Takhatpur.
3. Chief Executive Officer, Nagar Panchayat, Takhatpur.

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN NATURE OF CERTIORARI, MANDAMUS, PROHIBITION AND OTHER SUITABLE WRIT OR WRITS, DIRECTION OR DIRECTIONS, ORDER OR ORDERS:

A.F.R

(110)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.3318 of 2004

Shiv Singh Chouhan

-Versus-

State of Chhattisgarh & others

POST FOR ORDER ON 4th FEBRUARY, 2005

Sd/-
L.C. Bhadoo
Judge

A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.3318 of 2004

Shiv Singh Chouhan

-Versus-

State of Chhattisgarh & others

Present:

Shri Abhishek Sinha, Advocate: For the petitioner.

Shri N. K. Agrawal, Dy. A. G.: For the State/respondent No.1.

Shri Sanjay K. Agrawal Advocate: For respondent Nos.2 and 3.

O R D E R

(Passed on 4th February, 2005)

L.C. BHADOO, J.

The petitioner has preferred this writ petition under Article 226/227 of the Constitution of India questioning the action of respondents No.2 and 3 whereby the respondents had not supplied the tender form to the petitioner to enable him to participate in the tender process.

(2) Brief facts leading to filing of this writ petition are that respondent No.3 issued notice inviting tenders on 1-9-2004 (Annexure-P/1) which was published on 3-9-2004 in the newspaper, invited applications from the intending tenderers in a sealed envelope by 17-9-2004 in respect of execution of 15 works under the area of Nagar Panchayat Takhatpur on labour rates. The case of the petitioner is that on 16-9-2004 the petitioner approached respondent No.3 for supply of the tender form along with the terms and conditions of the N.I.T. and for that purpose the petitioner also deposited the amount (Annexure-P/2). The petitioner made a written application to respondent No.3 but the same was not acknowledged by respondent No.3, therefore, he approached the Tehsildar, Takhatpur, as respondent No.3 was not supplying the tender form, he made

a written request (Annexure-P/3) also. Then 17-9-2004 being a holiday, 18-9-2004 being Saturday and 19-9-2004 being Sunday, the tenders were not opened and the same were opened on 20th September 2004. In the meantime, the petitioner being aggrieved by the action of respondent No.3 approached the Sub Divisional Officer on 18-9-2004 and made an application Annexure-P/4. On that, the S.D.O. ordered for supply of the tender form to the petitioner, even then the tender form was not supplied to him.

(3) Further case of the petitioner is that the respondents did everything in a very secretive manner without making public known about the process and that was being done only to favour the persons of their choice and deprive other persons. Even in the N.I.T., which was published in the newspaper, the eligibility criteria was not incorporated. The approximate cost of the work to be executed was also not mentioned in the N.I.T. The period of completion of work was also not mentioned and the relevant information, which was mandatory in nature, was not mentioned in the N.I.T.. The respondents ought to have worked in a transparent and fair manner. The respondents acted in utter violation of the Chhattisgarh Municipalities (the Conduct of Business of the Mayor-in-Council/President-in-Council and the Powers and Functions of the Authorities) Rules, 1998 (hereinafter referred to as 'the Rules 1998').

(4) Reply has been filed on behalf of respondents No.2 and 3 in which it has been mentioned that N.I.T. was published in the newspaper and 17-9-2004 being a holiday, a corrigendum was issued and the days were extended up to 20th September 2004. It is further stated that EMD can be deposited in cash and the terms and conditions of the notice dated 3rd September 2004 were also prepared, copy of the same is Annexure-R-2/3. As per the terms and conditions of the N.I.T. only those contractors were eligible to participate in the tender process whose names were registered in the Government Department and in that connection, they were required to submit the registration certificate at the time of purchase of the

(113)

tender documents. As the petitioner was not a registered contractor with any of the Government department and he was not having any registration certificate, therefore, he was not satisfying the eligibility criteria, as such he was not entitled to purchase the tender form. The petitioner did not contact the respondents up to 15-9-2004 whereas, N.I.T. was published on 3-9-2004. Even according to the Rules, 1998, the registration of a contractor with a particular department of Government was necessary for issuance of the tender form and for award of contract. Rest of the allegations have been denied by the respondents. Rejoinder has also been filed on behalf of the petitioner.

(5) I have heard learned counsel for the parties.

(6) The first and foremost attack of learned counsel for the petitioner was that the N.I.T. in question (Annexure-P/1) was not in consonance with the Rules, 1998, as in the N.I.T. the eligibility criteria of the contractor, nature of the work, estimated cost and time was not published, therefore, whole tender process was vitiated. He further argued that in the first N.I.T. the tenders were invited for executing 15 works on a labour rate whereas, later on, it was also incorporated for supply of the material, which was not in the original N.I.T., which was not made public. He further argued that even the terms and conditions were prepared later on in order to meet this challenge of the writ petition and the petitioner was not allowed to participate in the tender process.

(7) On the other hand, learned counsel for the respondents had not argued on this aspect. He only argued that the petitioner was not eligible to participate in the N.I.T. because he was not registered with any of the Government department for executing the contract.

(8) On the other hand, learned counsel for the petitioner replied that had it made known in the N.I.T. itself that the intending tenderers must be registered with the Government department, then the petitioner could have renewed his registration which was already there but expired at

the time of publication of N.I.T. in question. Therefore, on this ground his petition cannot be thrown away.

(9) Having heard learned counsel for the parties, I have perused the relevant record and case law. As per the amended provisions dated 1st April 2003 in the Chhattisgarh Municipalities (the Conduct of Business of the Mayor-in-Council/President-in-Council and the Powers and Functions of the Authorities) Rules, 1998, rule 5-B was inserted which envisages that 'provisions of Chhattisgarh Works Department Manual shall be followed in the purchase of building materials for public works.' Therefore, in view of the above amendment, the P.W.D. manual was made applicable and as per clause 2.079 of the P.W.D. Manual it was necessary that the notice inviting tenders should be in one of the forms printed in Appendix 2.10 and 2.11. Appendix 2.10 specifies that it will be published in prescribed form which is reproduced as under:-

1. N.I.T. Form issued to.....
2. Tender invited from.....Class contractor.....
3. Due date of tender.....
4. Name of work.....
   .....
   .....
5. Amount of estimate.....
6. Amount of contract.....
7. Amount of earnest money.....
8. Cost of tender.....
9. Time allowed for completion.....
10. Works to be done on schedule of rates issued by..... force from.....

Therefore, it is an admitted position that the N.I.T. in question was not issued in conformity with the P.W.D. Manual and as far as the law on the point is concerned, the Hon'ble Apex Court in the matter of **Ramana Dayaram Shetty Vs. The International Airport Authority of India and others** reported in **AIR 1979 SUPREME COURT 1628** held that:

> "an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those

(115)

standards on pain of invalidation of an act in violation of them."

The Hon'ble Apex Court further observed that:

"It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement."

It was further observed that:

".....a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. When the Government is trading with the public,.....The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure."

In the matter of **New India Public School and others V. Huda and others** reported in **(1996) 5 Supreme Court Cases 510** the Hon'ble Apex Court has held that:

"When public authority discharges its public duty the word 'otherwise' would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and the public authority cannot discharge its duty at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. It would depend upon the nature of the scheme and object of public purpose sought to be achieved. In all cases relevant criterion should be predetermined by specific rules or regulations and published for the public. Therefore, the public authorities are required to make necessary specific regulations or valid guidelines to exercise

> their discretionary powers; otherwise, the salutary procedure would be by public auction."

(10) In the matter of **Dutta Associates Pvt. Ltd. V. Indo Merchantiles Pvt. Ltd. and others** reported in **(1997) 1 Supreme Court Cases 53** the Hon'ble Apex Court has held that:

> "Whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be *transparent, fair and open.* While a bona fide error or error of judgment would not certainly matter, any *abuse of power for extraneous reasons* would expose the authorities concerned."

Therefore, in view of the law laid down by the Hon'ble Apex Court it was the bounden duty of respondent No.3 while issuing the N.I.T., he ought to have acted in a transparent, fair and in open manner. As per the P.W.D. manual respondent No.3 was required to issue N.I.T. and to give all the details in the N.I.T. itself. If we look into the N.I.T. (Annexure-P/1) by any stretch of imagination it cannot be termed as in conformity with the P.W.D. Manual as mentioned above. Neither the eligibility criteria of the contractor is mentioned nor the nature of 15 works which were to be executed were mentioned, nor the cost of the work and time schedule within which the work was to be executed was mentioned. Therefore, respondent No.3 acted in a very secretive and in contravention of the established principle of law and the prescribed manner under the P.W.D. Manual while issuing the N.I.T., as such the action of respondent No.3 was totally illegal and was not in conformity with the requirement of P.W.D. Manual and the same was arbitrary.

(11) Now, coming to the question of maintainability of the writ petition, it is an admitted position that on the date when N.I.T. was issued and on the date i.e. 16-9-2004 when the petitioner approached respondent No.3 for supply of the N.I.T. form, the petitioner was not a registered

contractor with any of the Government department. Last date for selling the N.I.T. form was 16-9-2004 and on that day the petitioner approached respondent No.3 for supply of the N.I.T. to him. Therefore, he could not have been supplied the N.I.T. form because he was not registered on that day with any of the Government department. That being the last date, there is no force in the arguments of learned counsel for the petitioner that had it made known to the petitioner that only the registered contractors are allowed to participate in the N.I.T, he could have registered himself with the Government department. When he himself approached respondent No.3 for supply of N.I.T. form on the last day, then how he was able to register himself with the department? Even in Annexure-R-2/3, terms and conditions of N.I.T., in last para it has been specifically mentioned that terms and conditions of the N.I.T. were shown to the petitioner, but after seeing, he refused to sign the same. Even in Annexure-R-2/5 letter dated 20th September 2004 sent by the Chief Executive Officer, Nagar Panchayat, Takhatpur, to S.D.O., Kota, it has been specifically mentioned that as the petitioner is not a registered contractor, therefore, he is not entitled to participate in the tender process.

(12) In this connection, one Mohd. Asif has filed the affidavit (Annexure-R-2/6). He has stated that on 16-9-2004 the petitioner came to the office of Nagar Panchayat and requested for issuance of tender form for the work. The terms and conditions were shown to him and he was also informed that registration of the contractor in any Government department was necessary for issuance of tender form. After reading the terms and conditions carefully, he informed him that he is not registered with any of the Government department and thereafter, he refused to sign on the terms and conditions. Therefore, in view of the specific affidavit given by Mohd. Asif, employee of Nagar Panchayat, Takhatpur, District: Bilaspur and note to that effect is also available on the N.I.T., therefore, there is no reason before this Court to disbelieve the affidavit of this

employee and to disbelieve the stand taken by the respondents. On 16-9-2004, the petitioner himself approached the respondents and that being last day for issuance of the N.I.T. form and therefore, there was no occasion for the petitioner to get himself registered with any Government department, as such on that day he was not eligible to participate in the tender process. As such, on the request of the petitioner tender process cannot be quashed because if the tender process is quashed, then the respondents are required to undertake fresh tender process and that may be detrimental to the public interest and escalation of prices is also likely to be there. Moreover, there is no allegation that the respondents have awarded the contract or accepted the tender form of a person who was not otherwise eligible to participate in the tender process or any other illegality has taken place in selecting the contract. In this respect, I am fortified in my opinion by the decision of the Hon'ble Apex Court in the matter of **Raunaq International Ltd. V. I.V.R. Construction Ltd. and others** reported in **(1999) 1 Supreme Court Cases 492**. In para-8 of the said judgment it has been held that:

> 'But the challenger, the respondent, also did not fulfil the qualifying criterion. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced.'

(13) Similarly, the Division Bench of Orissa High Court in the matter of **Muralidhar Swain v. State of Orissa and others** reported in **1998 A I H C 2488** has held that:

> "Precondition of possession of "road making machineries like Hydraulic Paver Finisher with electronic sensor device" - Possession of paver without electronic device - Condition not fulfilled."

Therefore, refusal to issue tender form to a person who does not possess requisite machineries was not illegal. Also in the matter of **Shapers Construction (P) Ltd. and another V. Airport Authority of**

(119)

India and another reported in **(1996) 10 Supreme Court Cases 760** the Hon'ble Apex Court held that:

> "Petitioner applying for tender form on ground that it had completed major part of such works- Held, precondition of completion of the works having not been satisfied, there was no illegality in respondents not giving the tender form."

(14) Therefore, when on the date i.e. 16-9-2004 the petitioner approached respondent No.3, he was not registered with the Government department, as such he was not entitled to participate in the tender process and purchase the tender form. Therefore, on this ground the petitioner is not entitled to maintain the writ petition.

(15) In the result, the writ petition is liable to be dismissed, as the petitioner was not eligible to participate in the tender process, and it is accordingly dismissed. There will be no order as to costs.

Sd/-
L.C. Bhadoo
Judge

Barve